REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

MISCELLANEOUS CIVIL APPLICATION NO. 31 OF 2015

IN THE MATTER OF AN APPLICATION BY REUBEN WAMBURU KAROBA FOR ORDERS OF CERTIORARI AND MANDAMUS

AND

IN THE MATTER OF REGISTRAR OF LAND, KIAMBU COUNTY

JUDGEMENT

Introduction

1. By a Notice of Motion dated 2nd February, 2015, the *ex parte* applicant herein, **Reuben Wamburu Karoba**, seeks and order for certiorari to remove into the High Court and quash the decision of the Registrar of Lands, Kiambu County Lands Registry to place a restriction on land LR Githunguri/Githinga/T.408 (hereinafter referred to as "the suit land") belonging to him. He also seeks an order of *mandamus* compelling the same Registrar to revoke the restriction place on the suit land.

Applicant's Case

2. The applicant's case as contained in the affidavit verifying facts filed herein is that he is the proprietor of the suit land. However on 5th November, 2014 he visited the land registry at Kiambu to conduct a search on the said property and found that a restriction had been placed thereon.

3. According to him, contrary to section 76 of the ***Land Registration Act, No 3 of 2012*** (hereinafter referred to as "the Act"), he was neither informed nor heard before e said restriction was placed on his land.

4. He therefore contended that the said action mounted to denial of the rules of natural justice since his proprietary rights over the suit land have been gravely prejudiced. To him the decision of the said land registrar was ultra vires the aforesaid Act and amounted to an error of law and abuse of power. Further the said decision was against the rules of natural justice as well as the principle of legitimate expectation.

5. Although the Respondent was duly served, no response was filed to the application.

Determinations

6. I have considered the application, the grounds thereof, the verifying affidavit and the submissions filed.

7. This being a judicial review application, the Court is only concerned with determination of the issue whether the process of registration of the restriction on the suit parcel was illegal in the sense that the Land Registrar committed an error of law in the process of the said registration or acted without jurisdiction or *ultra vires*, or contrary to the provisions of a law or its principles; whether in so doing he/she was irrational in the sense that his/her action amounted to such gross unreasonableness that no reasonable authority, addressing itself to the facts and the law before it, would have made such a decision and hence was in defiance of logic and acceptable moral standards; or whether his/her action was tainted with procedural impropriety in the sense that he/she failed to act fairly in the process of taking a decision by either non-observance of the Rules of Natural Justice or to act with procedural fairness towards the Applicant. An instance of such unfairness is failure to adhere and observe procedural rules expressly laid down in a statute or legislative instrument by which the Respondent is enjoined to exercise his/her jurisdiction to make a decision. See **Pastoli vs. Kabale District Local Government Council and Others [2008] 2 EA 300; Council of Civil Unions vs. Minister for the Civil Service [1985] AC 2** and **An Application by Bukoba Gymkhana Club [1963] EA 478** at **479**

8. Sections 76(1) of the Act provides:

> ***For the prevention of any fraud or improper dealing or for any other sufficient cause, the Registrar may, either with or without the application of any person interested in the land, lease or charge, and after directing such inquiries to be made and notices to be served and hearing such persons as the Registrar considers fit, make an order (hereinafter referred to as a restriction) prohibiting or restricting dealings with any particular land, lease or charge.***

9. It is therefore clear that before the Registrar registers a restriction on any land he/she must direct such inquiries to be made and notices to be served and hear such persons as he/she considers fit. This position was confirmed in **Matoya vs. Standard Chartered Bank (K) Ltd & Others [2003] 1 EA 140** where it was held that:

> **"A restriction is ordered to prevent any fraud or improper dealing with a given parcel of land and the land registrar does this whether on its own motion or if so asked by way of an application by the person interested in that land but before ordering the restriction the registrar is bound by law to make inquiries, send out notices and hear all those other people he may think fit first and he is not to move by whim, caprice or whatever influence personal or otherwise just to impose a restriction since he has a duty to inquire and be satisfied that his duty to order restriction is not hurting a person who was not heard and that indeed the restriction is in general good that frauds and other improper dealings are prevented."**

10. In my view, in exercising his/her discretion on whom to hear the Registrar must take into account the provisions of the relevant law and the Constitution and with respect to the Constitution, Article 47 thereof provides as follows:

> ***(1) Every person has the right to administrative action that is expeditious, efficient, lawful, reasonable and procedurally fair.***
>
> ***(2) If a right or fundamental freedom of a person has been or is likely to be adversely affected by administrative action, the person has the right to be given written reasons for the action.***

11. As discussed elsewhere in this judgement procedural fairness encompasses that an opportunity of a hearing be afforded to the persons who are likely to be affected by the administrative decision. In my view one of the persons who ought to be given an opportunity of being heard before a restriction is registered is the proprietor of the land in question.

12.In this case the Land Registrar has not sworn any replying affidavit to explain the circumstances under which the restriction was registered. It was the onus of the Land Registrar to shed light on whether the provisions of section 76(1) of the Act was complied with. As far as the Applicant was

concerned its position was that it was not notified before the restriction was registered. In other words it was asserting a negative and as was held by **Seaton, JSC** in the Uganda case of **J K Patel vs. Spear Motors Ltd SCCA No. 4 of 1991 [1993] VI KALR 85**:

> **"The proving of a negative task is always difficult and often impossible, and would be a most exceptional burden to impose upon a litigant. The burden of proof in any particular case depends on circumstances in which the claim arises."**

13.Similarly, the Supreme Court of Uganda in **Sheikh Ali Senyonga & 7 Others vs. Shaikh Hussein Rajab Kakooza and 6 Others SCCA NO. 9 of 1990 [1992] V KALR 30** was of the view that the general rule that he who alleges must prove applies and since it was the appellants who were alleging that the fifth appellant was qualified, to hold that the negative must be proved by the respondents would be to impose an unnecessary burden on them.

14.Article 40(3) of the Constitution bars the State from depriving a person of property of any description, or of any interest in, or right over, property of any description unless certain conditions including the requirement that the deprivation be carried out in accordance with the Constitution, are met. Therefore Article 47 of the Constitution must be complied with before a person is deprived of his or her interest in any property of any description or his interest therein is restricted. That Article requires that the process be procedurally fair and one of the ingredients of a fair procedure is the right to be afforded an opportunity of being heard before a decision is made.

15. In this case, in the absence of any evidence that the Land Registrar, Kiambu County complied with the provisions of section 76(1) of the ***Land Registration Act***, this Court has no option but to find that his/her action in placing a restriction on the suit land was tainted with procedural irregularity.

16.It follows that the Applicant's Motion dated 2nd February, 2015 is merited.

17. However, it is clear that the Motion was not properly intituled. In judicial review applications, the applicant is always the Republic rather than the person aggrieved by the decision sought to be impugned. See **Farmers Bus Service & Others vs. Transport Licensing Appeal Tribunal [1959] EA 779.**

18.The rationale for this was given in **Mohamed Ahmed vs. R [1957] EA 523** where it was held:

> **"This recital reveals a series of muddles and errors which is not unique in Uganda and is attributable to laxity in practitioners' offices and in some registries of the High Court. The appellant's advocate appears to have failed entirely to realise that prerogative orders, like the old prerogative writs, are issued in the name of the crown at the instance of the applicant and are directed to the person or persons who are to comply therewith. Applications for such orders must be intituled and served accordingly. The Crown cannot be both applicant and respondent in the same matter".**

19.In **Jotham Mulati Welamondi vs. The Electoral Commission of Kenya Bungoma H.C. Misc. Appl. No. 81 of 2002 [2002] 1 KLR 486 Ringera, J** (as he then was) expressed himself as follows:

> **"Prerogative orders are issued in the name of the crown and applications for such orders must be correctly intituled and accordingly, the orders of *Certiorari*, *Mandamus* or Prohibition are issued in the name of the Republic and applications therefore are made in the name of the Republic at the instance of the person affected by the action or omission in issue and the proper format of the substantive motion for *Mandamus* is: -**
>
> **"REPUBLIC……..……..……..APPLICANT**
>
> **V**

THE ELECTORAL COMMISSION OF KENYA……RESPONDENT.

EX PARTE

JOTHAM MULATI WELAMONDI"

20. In this case, the Motion does not indicate in the title who the parties to the Motion are.

21.However in **Republic Ex Parte the Minister for Finance & The Commissioner of Insurance as Licensing and Regulating Officers vs. Charles Lutta Kasamani T/A Kasamani & Co. Advocate & Another Civil Appeal (Application) No. Nai. 281 of 2005** the Court of Appeal stated:

> **"Suffice it to say that a defect in form in the title or heading of an appeal, or a misjoinder or non-joinder of parties are irregularities that do not go to the substance of the appeal and are curable by amendment...Is the form of title to the appeal as adopted by the Attorney General in this matter defective or irregular? We think not, as we find that it substantially complies with the guidelines set out by this Court".**

22. I however must state that the failure by a party to properly intitule the proceedings may lead to denial of costs in the event that the party in default succeeds in the application or even being penalised in costs.

Order

23. Accordingly I hereby issue an order of certiorari removing into this Court the decision of the Registrar of Lands, Kiambu County Lands Registry to place a restriction on land LR Githunguri/Githinga/T.408 belonging to **Reuben Wamburu Karoba** which decision is hereby quashed. I also issue an order of *mandamus* compelling the same Registrar to remove the offending restriction place on the same land. As the application was not properly intituled, there will be no order as to costs.

Dated at Nairobi this day 17th day of March, 2015

G V ODUNGA

JUDGE

Delivered in the presence of:

Mr Ojienda for the Applicant

Cc Patricia